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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 ERWINTHANSHEA B.,

12 Plaintiff,

13 v.

14 NANCY A. BERRYHILL, Acting
15 Commissioner of Social Security
16 Administration,

17 Defendant.
18

Case No. ED CV 17-871-SP

MEMORANDUM OPINION AND
ORDER

19 I.

20 **INTRODUCTION**

21 On May 4, 2017, plaintiff Erwinthanshea B. filed a complaint against the
22 Commissioner of the Social Security Administration (“Commissioner”), seeking a
23 review of a denial of supplemental security income (“SSI”). The court deems the
24 matter suitable for adjudication without oral argument.

25 Plaintiff presents one issue for decision: whether the Administrative Law
26 Judge (“ALJ”) erred at step two in determining that plaintiff does not suffer from
27 a severe mental impairment. Plaintiff’s Memorandum in Support of Plaintiff’s
28 Complaint (“P. Mem.”) at 4-11; *see* Defendant’s Memorandum in Support of

1 Defendant's Answer ("D. Mem.") at 1-6.

2 Having carefully studied the parties' memoranda, the Administrative
3 Record ("AR"), and the decision of the ALJ, the court concludes that the ALJ did
4 not err at step two. Consequently, the court affirms the decision of the
5 Commissioner denying benefits.

6 II.

7 FACTUAL AND PROCEDURAL BACKGROUND

8 Plaintiff has a twelfth grade education and was thirty-five years old on his
9 alleged disability onset date, December 1, 2011. AR at 56, 59. He has past work
10 as a car detailer, a janitor, and prep mechanic. *Id.* at 143.

11 On August 29, 2013, plaintiff filed an application for SSI due to manic
12 depressive disorder, anti-social disorder, and mood disorder. *Id.* at 56. The
13 Commissioner denied plaintiff's application initially and upon reconsideration,
14 after which plaintiff filed a request for a hearing. *Id.* at 27-33.

15 On November 17, 2015, plaintiff appeared without counsel and testified at a
16 hearing before the ALJ in Moreno Valley, California. *Id.* at 41-54. On December
17 8, 2015, the ALJ denied plaintiff's claim for benefits. *Id.* at 27-33.

18 Applying the five-step sequential evaluation process, the ALJ found, at step
19 one, that plaintiff had not engaged in substantial gainful activity since August 29,
20 2013, the date of plaintiff's SSI application. *Id.* at 29.

21 At step two, the ALJ found plaintiff suffered from affective mood disorder
22 and substance addiction disorder. *Id.* But the ALJ concluded these impairments,
23 either individually or in combination, were not severe. *Id.* Consequently, the ALJ
24 concluded plaintiff did not suffer from a disability as defined by the Social
25 Security Act. *Id.* at 33.

26 Plaintiff filed a timely request for review of the ALJ's decision, but the
27 Appeals Council denied the request for review. *Id.* at 12. The ALJ's decision
28 stands as the final decision of the Commissioner.

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1 IV.

2 **DISCUSSION**

3 Plaintiff argues the ALJ's step two finding that his mental impairment was
4 non-severe was not supported by substantial evidence. P. Mem. at 4-11. Plaintiff
5 particularly argues the ALJ erred in rejecting the opinion of examining physician
6 Dr. Marcel Van Eerd, and instead relying on other opinions of record, and in
7 failing to further develop the record.

8 At step two, the Commissioner considers the severity of the claimant's
9 impairments. 20 C.F.R. § 404.1520(a)(4)(ii).¹ "[T]he step-two inquiry is a de
10 minimis screening device to dispose of groundless claims." *Smolen v. Chater*, 80
11 F.3d 1273, 1290 (9th Cir. 1996). In order for a claimant to be considered
12 disabled, the severe impairment must have lasted or be expected to last for a
13 continuous period of at least twelve months. 20 C.F.R. §§ 404.1509, 416.909.
14 "An impairment or combination of impairments can be found not severe only if
15 the evidence establishes a slight abnormality that has no more than a minimal
16 effect on an individual's ability to work." *Id.* (citation and quotation marks
17 omitted). Nonetheless, "[t]he claimant [still] carries the initial burden of proving a
18 disability." *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005).

19 To establish a medically determinable impairment, it must be supported by
20 objective medical evidence, not only the plaintiff's statements. *See* 20 C.F.R.
21 § 416.908 ("A physical or mental impairment must be established by medical
22 evidence consisting of signs, symptoms, and laboratory findings, not only by your
23 statement of symptoms."); *see also Ukolov v. Barnhart*, 420 F.3d 1002, 1006 (9th
24 Cir. 2005). "[A]pplying our normal standard of review to the requirements of step
25 two, we must determine whether the ALJ had substantial evidence to find that the
26 medical evidence clearly established that [the claimant] did not have a medically

27
28 ¹ All citations to the Code of Federal Regulations refer to regulations
applicable to claims filed before March 27, 2017.

1 severe impairment or combination of impairments.” *Webb v. Barnhart*, 433 F.3d
2 683, 687 (9th Cir. 2005).

3 The ALJ here recognized plaintiff’s impairments, including affective mood
4 disorder and substance addiction disorder, but concluded they were non-severe.
5 In making this determination, the ALJ “considered the four broad functional areas
6 set out in the disability regulations for evaluating mental disorders,” which are
7 known as the “paragraph B” criteria. AR at 33. The four areas of function, in
8 which the ALJ must rate the degree of functional limitation, are: (a) activities of
9 daily living; (b) social functioning; (c) concentration, persistence, or pace; and (d)
10 episodes of decompensation. 20 C.F.R. § 416.920a(c)(3). If there are no more
11 than mild limitations in the first three areas and no episodes of decompensation,
12 the mental impairments are generally found to be not severe. 20 C.F.R.
13 § 416.920(d)(1). The ALJ here found plaintiff had no functional limitation in
14 daily living, only mild impairment in social function, no limitation in
15 concentration, persistence, or pace, and no episodes of decompensation of
16 extended duration. AR at 33. He consequently concluded plaintiff did not suffer
17 from a severe mental impairment. *Id.*

18 Plaintiff does not dispute the lack of evidence of any decompensation
19 episode, but does dispute the other findings. In finding plaintiff had no limitations
20 in his activities of daily living, the ALJ noted plaintiff takes care of his young son
21 without assistance, is capable of self-care, and has reported little difficulty. *Id.*
22 Plaintiff argues that a general reference to childcare is not good reason to find him
23 not disabled (P. Mem. at 11); however, that was not the ALJ’s analysis. The ALJ
24 made a specific finding that the record reflected no problems in activities of daily
25 living, and this finding is supported by substantial evidence in the record. This
26 includes evidence that plaintiff watches after his two-year-old son for up to eight
27 hours a day, does chores around the home, cares for his own personal hygiene,
28 and occasionally drives. AR at 48-51, 151-57, 184-92, 240, 268.

1 The ALJ found that, based on plaintiff's positive responses to treatment, his
2 social functioning was only mildly impaired. *Id.* at 33. The ALJ specifically cited
3 to plaintiff's treatment records from his time in prison in 2015, which did not
4 indicate severe mental limitations. *Id.* at 31, 33; *see id.* at 294-352. For example,
5 a January 10, 2015 mental status exam was normal in all respects, including
6 having intact insight and social judgment. *Id.* at 304. And notes from a March 4,
7 2015 exam showed plaintiff was experiencing only minimal symptoms when
8 medicated. *Id.* at 337; *see also Warre v. Comm'r. of Soc. Sec.*, 439 F.3d 1001,
9 1006 (9th Cir. 2006) ("Impairments that can be controlled effectively with
10 medication are not disabling for the purpose of determining...SSI benefits.").

11 In the third functional area, concentration, persistence, and pace, the ALJ
12 found plaintiff had no limitation because his mental status examinations
13 documented no such problems. AR at 33. The ALJ again cited to plaintiff's
14 prison records, specifically, the normal findings at his January 10, 2015 and April
15 20, 2015 exams. *See id.* at 304, 333.

16 The ALJ's determination that plaintiff had no more than mild limitations in
17 any of the four functional areas, and did not have a severe mental impairment, was
18 also supported by the opinions of the State agency medical consultants (at the
19 initial as well as reconsideration levels of review), Dr. K. Loomis and Dr. Kim
20 Morris, and by the opinion of examining physician Dr. Robin Rhodes Campbell.
21 AR 61-62, 70-71, 266-71. Thus, there was substantial evidence in the record to
22 support the ALJ's step two finding.

23 Plaintiff argues, however, that the ALJ should have instead relied on the Dr.
24 Van Eerd's opinion, and should have further developed the record. The court thus
25 turns to those issues.

26 **A. The ALJ Properly Weighed the Medical Opinions**

27 Plaintiff argues the ALJ failed to provide specific and legitimate reasons
28 supported by substantial evidence for discounting the opinion of Dr. Van Eerd

1 while relying on those of Dr. Campbell and the State Agency physicians.

2 In determining whether a claimant has a medically determinable
3 impairment, among the evidence the ALJ considers is medical evidence. 20
4 C.F.R. §§ 404.1527(b), 416.927(b). In evaluating medical opinions, the
5 regulations distinguish among three types of physicians: (1) treating physicians;
6 (2) examining physicians; and (3) non-examining physicians. 20 C.F.R.
7 §§ 404.1527(c), (e), 416.926(c), (e); *Lester*, 81 F.3d at 830. “Generally, a treating
8 physician’s opinion carries more weight than an examining physician’s, and an
9 examining physician’s opinion carries more weight than a reviewing physician’s.”
10 *Holohan v. Massanari*, 246 F.3d 1195, 1202 (9th Cir. 2001); 20 C.F.R.
11 §§ 404.1527(c)(1)-(2), 416.927(c)(1)-(2). The opinion of the treating physician is
12 generally given the greatest weight because the treating physician is employed to
13 cure and has a greater opportunity to understand and observe a claimant. *Smolen*
14 *v. Chater*, 80 F.3d 1273, 1285 (9th Cir. 1996); *Magallanes v. Bowen*, 881 F.2d
15 747, 751 (9th Cir. 1989).

16 Nevertheless, the ALJ is not bound by the opinion of the treating physician.
17 *Smolen*, 80 F.3d at 1285. If a treating physician’s opinion is uncontradicted, the
18 ALJ must provide clear and convincing reasons for giving it less weight. *Lester*,
19 81 F.3d at 830. If the treating physician’s opinion is contradicted by other
20 opinions, the ALJ must provide specific and legitimate reasons supported by
21 substantial evidence for rejecting it. *Id.* at 830. Likewise, the ALJ must provide
22 specific and legitimate reasons supported by substantial evidence in rejecting the
23 contradicted opinions of examining physicians. *Id.* at 830-31. The opinion of a
24 non-examining physician, standing alone, cannot constitute substantial evidence.
25 *Widmark v. Barnhart*, 454 F.3d 1063, 1066-67 n.2 (9th Cir. 2006); *Morgan v.*
26 *Comm’r*, 169 F.3d 595, 602 (9th Cir. 1999); *see also Erickson v. Shalala*, 9 F.3d
27 813, 818 n.7 (9th Cir. 1993).

28 Dr. Van Eerd, a psychologist, examined plaintiff on February 16, 2011. AR

1 at 239. Plaintiff appeared neat and appropriately dressed, but with resentful
2 mannerisms and avoidant in his interactions. *Id.* at 240. Plaintiff was oriented as
3 to time, place, person, and situation, but wrong about the day of the week and
4 date. *Id.* at 242. He was unable to recall three words after three minutes, unable
5 to correctly provide the alphabet, unable to spell “world” backwards, and made
6 errors in serial sevens and arithmetic. *Id.* He also had poor responses to basic
7 informational inquiries, vocabulary, proverbs, social awareness, and social
8 judgment. *Id.* Dr. Van Eerd diagnosed plaintiff with depression, a learning
9 disability, and a history of head injury. *Id.* Dr. Van Eerd found plaintiff’s affect
10 was labile with depressed mood, his pace was very slow, and his intellectual
11 functioning was below average. *Id.* He opined plaintiff would likely have
12 difficulty accepting supervision and remembering and completing simple tasks.
13 *Id.* He recommended job training. *Id.*

14 The ALJ gave Dr. Van Eerd’s opinion little weight for two reasons: first, it
15 was based on a one-time examination of plaintiff with the opportunity to review
16 only limited evidence in the record; and second, it contrasted sharply with the
17 other medical evidence of record. *Id.* at 31.

18 Plaintiff argues the first reason given was not specific and legitimate
19 because the ALJ accepted Dr. Campbell’s conclusions, which were also based on
20 a one-time examination. Plaintiff is correct in part. The mere fact that Dr. Van
21 Eerd examined plaintiff only once is not a legitimate basis to reject his opinion.
22 But the ALJ noted that not only did Dr. Van Eerd examine plaintiff only once, but
23 the examination occurred almost a year before the alleged onset date and more
24 than two years before the application date, and Dr. Van Eerd consequently had no
25 opportunity to review the bulk of the evidence in the record, which was generated
26 after his February 2011 exam. This is at least a basis to view Dr. Van Eerd’s
27 opinion with caution, if not an adequate reason by itself to reject the opinion.

28 The second reason given, however, was specific and legitimate and

1 supported by substantial evidence. As discussed above, the other evidence in the
2 record (which was not available to Dr. Van Eerd) shows plaintiff's mental status
3 findings were largely normal, with plaintiff experiencing only minimal symptoms
4 when medicated.

5 Plaintiff contends that his low Global Assessment of Functioning ("GAF")
6 scores, which ranged from 40 to 68, denote "serious symptoms." P. Mem. at 8;
7 *see* AR at 252, 271, 272, 274, 275, 277, 305, 308, 310, 312, 314, 324. But the
8 ALJ specifically discounted the value of the GAF scores, finding they "reveal
9 only snapshots of impaired and improved behavior, provide nothing by way of
10 function-by-function capacity or limitations, and do not provide a reliable
11 longitudinal perspective of the claimant's mental functioning." AR at 32. Indeed,
12 an ALJ is not required to consider a GAF score "because a GAF score is merely a
13 rough estimate of an individual's psychological, social, or occupational functional
14 used to reflect an individual's need for treatment, but it does not have any direct
15 correlative work-related or functional limitations." *Hughes v. Colvin*, 599 Fed.
16 Appx. 765, 766 (9th Cir. 2015) (citing *Vargas v. Lambert*, 159 F.3d 1161, 1164
17 n.2 (9th Cir. 1998)); *see also Johnson v. Colvin*, 2015 WL 1839641, at *4 n.3
18 (M.D. Tenn. Apr. 21, 2015) (noting "the fifth edition of the [DSM] eliminates the
19 GAF scoring system completely and that "[t]he SSA explicitly advises ALJs there
20 is no correlation between GAF ratings and the B criteria in the mental disorders
21 listings") (citation and internal quotation marks omitted).

22 The State Agency physicians, Drs. Loomis and Morris, reviewed far more
23 records than Dr. Van Eerd, including records from the relevant period, reaching
24 up through early 2014 in Dr. Morris's case. *See* AR at 57-59, 67-68. As
25 discussed above, they found plaintiff had no more than mild limitations and did
26 not have a severe mental impairment. *Id.* at 61-62, 70-71. The ALJ gave their
27 opinions great weight because they were consistent with the objective medical
28 evidence. *Id.* at 31. This was proper, for the same reason it was proper for the

1 ALJ to reject Dr. Van Eerd's opinion on that basis.

2 The ALJ also cited to the opinion of examining physician Dr. Campbell to
3 support his finding that plaintiff did not have a severe impairment. This too
4 contradicted Dr. Van Eerd's opinion and supported the ALJ's determination. *See*
5 *id.* at 266-71. While Dr. Campbell found plaintiff's cognitive function to be
6 extremely low, she cautioned that "these test results are unlikely to be an accurate
7 representation of [plaintiff's] current cognitive and psychological functioning"
8 because plaintiff gave a very poor effort during testing, and appeared to be
9 exaggerating and dissimulating. *Id.* at 268, 270. Even so, Dr. Campbell found
10 plaintiff largely unimpaired. *Id.* at 271.

11 In sum, the ALJ gave a specific and legitimate reason supported by
12 substantial evidence for discounting Dr. Van Eerd's opinion, and properly
13 weighed the other medical evidence, which supported his determination that
14 plaintiff did not suffer from a severe mental impairment.

15 **B. The ALJ Did Not Err in Not Further Developing the Record**

16 Plaintiff additionally contends that the ALJ did not fully and fairly develop
17 the record as he is required to, especially in light of the fact that plaintiff appeared
18 without counsel at the hearing. P. Mem. at 10.

19 Even when a claimant is represented by counsel, an "ALJ has a special duty
20 to fully and fairly develop the record and to assure that the claimant's interests are
21 considered." *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir. 1983) (citation
22 omitted). Yet plaintiff has the burden of "furnish[ing] medical and other evidence
23 that [the Commissioner] can use to reach conclusions about [plaintiff's] medical
24 impairments(s)." *Mayes*, 276 F.3d at 459 (quoting 20 C.F.R. § 404.1512(a)).
25 Plaintiff may not shift his burden of production to the ALJ. *Id.*; *see* 42 U.S.C.
26 § 423(d)(5).

27 The duty to further develop the record is triggered when the record is
28 ambiguous or otherwise inadequate. *See Webb*, 433 F.3d at 687; *see also Mayes*,

1 276 F.3d at 459-60 (ALJ has a duty to develop the record further only “when there
2 is ambiguous evidence or when the record is inadequate to allow for proper
3 evaluation of the evidence”). Generally, the ALJ fulfills this duty by making a
4 reasonable attempt to obtain additional medical evidence from the claimant's
5 treating sources, ordering a consultative examination where the medical evidence
6 is incomplete or unclear, or subpoenaing the claimant’s physicians or their
7 records. *Tonapetyan*, 242 F.3d at 1150. When there is evidence of a mental
8 impairment or the claimant is unrepresented, this duty to develop is “heightened.”
9 *Id.*

10 Here, there was no ambiguity that warranted further development of the
11 record. Plaintiff points to his testimony at the November 2015 hearing that he had
12 recently begun treatment with Dr. Richard Chenik at High Desert Family Health
13 Clinic, whom plaintiff had since twice following his July 2015 release from
14 prison. *See* AR at 47. Those treatment notes are not in the record, and plaintiff
15 argues the ALJ should have requested them before rendering his decision. Yet as
16 defendant points out, given that there are treatment notes in the record up through
17 April 2015 that support a finding of no severe impairment, and given that plaintiff
18 had the burden to establish disability for a continuous twelve-month period, there
19 was no reason for the ALJ to believe that Dr. Chenik’s treatment records (which
20 could have begun only a few months before the ALJ’s decision) would provide a
21 basis for a different determination. *See Tidwell v. Apfel*, 161 F.3d 599, 602 (9th
22 Cir. 1998) (no duty to further develop record based on physician’s examination
23 more than a year after expiration of insured status).


24 Accordingly, substantial evidence in the record supported the ALJ’s step
25 two determination, and the ALJ had no duty to further develop the record.
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V.

CONCLUSION

IT IS THEREFORE ORDERED that Judgment shall be entered
AFFIRMING the decision of the Commissioner denying benefits, and dismissing
the complaint with prejudice.

DATED: March 25, 2019

A handwritten signature in black ink, appearing to read 'SHERI PYM', written over a horizontal line.

SHERI PYM
United States Magistrate Judge